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Dated: April 7, 2000

Case No. 2000-CAA-00001

In the Matter of

HUGH L. HONDORP
Complainant

v.

ASHLAND CHEMICAL COMPANY
Respondent

RECOMMENDED ORDER
APPROVING SETTLEMENT and DISMISSING THE COMPLAINT

This case arises under the Clean Air Act (CAA), 42 U.S.C. § 7622 (1988). On April 4, 2000, the parties submitted their "Settlement Agreement and General Release." Pursuant to the Settlement Agreement, the parties also submitted a "Joint Motion for Dismissal with Prejudice," requesting dismissal of the complaint with prejudice. The parties seek approval of the settlement and dismissal of the complaint.

The Settlement Agreement (¶ 4) provides that Respondent shall pay Complainant specified amounts, including Complainant's attorney's fees and costs. The Settlement Agreement (¶ 12) also provides protections for Complainant with respect to references that Respondent shall provide to prospective employers.

I must determine whether the terms of the agreement are a fair, adequate and reasonable settlement of the complaint. Marcus v. U.S. Environmental Protection Agency, ALJ Case Nos. 96-CAA-3, 7, ARB Case No. 99-027 (Oct. 29, 1999).

Paragraph 2 of the Settlement Agreement provides that Complainant releases Respondent from claims arising under the CAA as well as under various other laws. This review is limited to

whether the terms of the settlement are a fair, adequate and reasonable settlement of Complainant's allegations that Respondent violated the CAA. Poulos v. Ambassador Fuel Oil Co., Inc., Case No. 86-CAA-1. Sec'y Order, slip op. at 2 (Nov. 2, 1987).

Paragraph 10 of the Settlement Agreement provides that Complainant shall not reveal its terms or his allegations against Respondent, but includes an exception allowing Complainant to disclose the contents of the agreement in order to respond to an inquiry from a governmental agency, or pursuant to court order. The confidentiality provision in paragraph 10 of the Settlement Agreement could be considered to constitute a "gag provision" that is unacceptable as being against public policy if it precludes Complainant from communicating with federal or state enforcement agencies concerning alleged violations of law. However, I interpret paragraph 10 as not preventing Complainant, either voluntarily or pursuant to an order or subpoena, from communicating with, or providing information to, state or federal authorities about suspected violations of law involving Respondent. Therefore, paragraph 10 does not contain an invalid gag provision. Thornton v. Burlington Environmental and Phillip Environmental, 94-TSC-2, Sec'y Final Order Approving Settlement and Dismissing Complaint (Mar. 17, 1995).

On the other hand, in the event that the language in paragraph 10 bars Complainant from voluntarily communicating with, or providing information to, governmental agencies, paragraph 10 is herewith found void and is severed from the Settlement Agreement, pursuant to paragraph 16. Paragraph 16 of the Settlement Agreement provides for severability of invalid provisions by "a Court of competent jurisdiction" (which I construe to include myself as a federal administrative law judge, or the Administrative Review Board, with jurisdiction over this matter). Paragraph 16 of the Settlement Agreement, in its entirety, states:

> Should any provision of this Agreement be declared or determined by a Court of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity and enforceability of the remaining parts, terms or provisions shall not be affected thereby and said illegal, unenforceable or invalid part, term or provision shall be deemed not to be part of the Agreement.

In Brown v. Holmes & Narver, Inc., Case No. 90-ERA-26, Final Order Approving Settlement and Dismissing Complaint, slip op. at 2 (May 11, 1994), the Secretary of Labor found a similar settlement provision to be void as contrary to public policy and unenforceable. However, based on the agreement's severability provision, the Secretary severed the offending provision from the approved settlement, stating:

> The severance provision permits me to approve the remainder of the Agreement without the offending language prohibiting the parties

> from discussing the facts surrounding the complaint with government agencies.[1]

Paragraph 10 of the Settlement Agreement may also be impacted by the Freedom of Information Act, 5 U.S.C. §552 (1988) (FOIA).[2] The Secretary of Labor has held with respect to confidentiality provisions in settlement agreements that FOIA "requires agencies to disclose requested documents unless they are exempt from disclosure...." Coffman v. Alyeska Pipeline Services Co. and Arctic Slope Inspection Services, 96-TSC-5, ARB Case No. 96-141, Final Order Approving Settlement and Dismissing Complaint, slip op. at 2-3 (June 24, 1996). See also Plumlee v. Alyeska Pipeline Services Co., Case Nos. 92-TSC-7, 10; 92-WPC-6, 7,8,10, Sec. Final Order Approving Settlements and Dismissing Cases with Prejudice, slip op. at 6 (Aug, 6, 1993); Davis v. Valley View Ferry Authority, Case No. 93-WPC-1, Sec. Final Order Approving Settlement and Dismissing Complaint, slip op. at 2 n.1 (June 28, 1993) (parties' submissions become part of record and are subject to the FOIA); Ratliff v. Airco Gases, Case No. 93-STA-5, Sec. Final Order Approving Settlement and Dismissing Complaint with Prejudice, slip op. at 2 (June 25, 1993)(same).

The records in the instant case are agency records which must be made available for public inspection and copying under FOIA. In the event a request for inspection and copying of the record is made by a member of the public, that request must be responded to as provided in FOIA. If an exemption is applicable to the record in this case or any specific document in it, the Department of Labor would determine at the time a request is made whether to exercise its discretion to claim the exemption and withhold the document. If no exemption were applicable, the document would have to be disclosed. Since no FOIA request has been made, it would be premature to determine whether any of the exemptions in FOIA would be applicable and whether the Department of Labor would exercise its authority to claim such an exemption and withhold the requested information. Further, it would be inappropriate to decide such questions in this proceeding. Department of Labor regulations provide specific procedures for responding to FOIA requests, for appeals by requestors

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[1]In Paine v. Saybolt, Inc., ALJ Case No. 97-CAA-4, ARB Case No. 97-102, ARB Order Disapproving Settlement and Remanding the Case (July 22, 1997), the ARB stated that it could not sever or modify material terms of a negotiated settlement. For this proposition, the ARB cited Macktal v. Secretary of Labor , 923 F.2d 1150, 1154-56 (5th Cir. 1991). However, Macktal is inapposite because it appears that in that case the settlement agreement did not contain severability language, while in the instant case the settlement agreement itself provides for the severance of any provision found to be improper by a court of competent jurisdiction. Macktal stated that the Secretary could not sever an offending provision "without the consent of the other two parties." 923 F.2d at 1155-56. Macktal was distinguished in Brown v. Holmes & Narver, Inc., supra. In the instant case paragraph 16 of the Settlement Agreement provides the parties' consent to severance.

[2]However, there is no provision in the Settlement Agreement designating anything in it as confidential commercial information pursuant to 29 C.F.R. § 70.26(b).

from denial of such requests, and for protecting the interests of submitters of confidential commercial information. See 29 C.F.R. Part 70 (1995).

The Secretary requires that all parties requesting settlement approval of cases arising under environmental protection statutes provide the settlement documentation for any other alleged claims arising from the same factual circumstances forming the basis of the federal claim, or certify that no other such settlement agreements were entered into between the parties. Biddy v. Alyeska Pipeline Service Company, 95-TSC-7, ARB Case Nos. 96-109, 97-015, Final Order Approving Settlement and Dismissing Complaint, slip op. at 3 (Dec. 3, 1996). Paragraph 15 of the Settlement Agreement states, *inter alia*, that, "No other...agreement or understanding of any kind or description has been made with [Complainant] or to him to enter into this agreement." Accordingly, the parties have certified that the agreement constitutes the entire and only settlement agreement with respect to Complainant's claims.

Finally, paragraph 17 provides that the Settlement Agreement will be governed by the laws of the State of New Jersey. I construe this provision as not limiting the authority of the Secretary of Labor or a federal court under the CAA and the implementing regulations. Brown v. Holmes & Narver, Inc., supra, slip op. at 2.

I find that the agreement, as construed above, is a fair, adequate, and reasonable settlement of the complaint. Accordingly, I APPROVE THE SETTLEMENT AGREEMENT and DISMISS THE COMPLAINT WITH PREJUDICE.

SO ORDERED.

Robert D. Kaplan
Administrative Law Judge

Dated: April 7, 2000
Camden, New Jersey

NOTICE: This Recommended Order Approving Settlement and Dismissing the Complaint will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, DC 20210. Such a petition must be received by the Administrative Review Board within ten business days of the date of this Recommended Order, and shall be served on all parties and on the Chief Administrative Law Judge. See C.F.R. § 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).